

**Before the
Federal COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Request for Clarification of the Commission’s)	MB Docket No. 13-50
Policies and Procedures Under)	
47 U.S.C. § 310(b)(4))	

COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

The National Association of Broadcasters (“NAB”)¹ hereby responds to the *Public Notice*² in the above-captioned proceeding. The Coalition for Broadcast Investment (“CBI”) seeks clarification of the policies and procedures on foreign ownership of and investment in entities that control U.S. broadcast licensees. Specifically, CBI asks the Commission to clarify and affirm that it will substantively evaluate proposals for foreign investment in the parent companies of broadcast licensees that exceed Section 310(b)(4)’s benchmark to determine if those proposals serve the public interest.³

NAB supports CBI’s request. As explained in detail below, granting this request would help inject vital investment capital into the broadcast industry, thereby promoting

¹ NAB is a nonprofit trade association that advocates on behalf of local radio and television stations and broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the courts.

² *Media Bureau Announces Filing of Request for Clarification of the Commission’s Policies and Procedures Under 47 U.S.C. § 310(b)(4)*, Public Notice, MB Docket No. 13-50 (Feb. 26, 2013).

³ Letter from Mace Rosenstein and Gerard J. Waldron, Counsel for CBI, to Marlene H. Dortch, Secretary, Federal Communications Commission (Aug. 31, 2012), at 1 (“CBI Letter”).

a more competitive, diverse and innovative industry. The Commission's exercise of its statutory discretion as requested by CBI thus would serve the public interest.

I. Section 310(b)(4) Grants the Commission Clear Discretion to Permit Foreign Investment and Ownership Above the Statutory Benchmark

Section 310(b)(4) of the Communications Act of 1934, as amended, provides:

(b) No broadcast or common carrier or aeronautical en route or aeronautical fixed radio station license shall be granted to or held by—

(4) any corporation directly or indirectly controlled by any other corporation of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, *if the Commission finds that the public interest will be served by the refusal or revocation of such license.*⁴

As its language makes clear, Section 310(b)(4) grants the Commission authority to deny or revoke a broadcast license if foreign ownership or investment in the licensee's parent company exceeds 25 percent and if the Commission finds that such investment is not in the public interest. Accordingly, the Commission has full discretion to approve foreign investment above the 25 percent level in entities controlling broadcast licensees, if it finds the public interest would be served by doing so.⁵

⁴ 47 U.S.C. § 310(b)(4) (emphasis added).

⁵ *Review of Foreign Ownership Policies for Common Carrier and Aeronautical Radio Licensees under Section 301(b)(4) of the Communications Act of 1934, as Amended*, Notice of Proposed Rulemaking, 26 FCC Rcd 11703, 11706 (2011) ("the Commission has . . . authority to allow foreign investment above the 25 percent benchmark level in section 310(b)(4) unless we determine that the investment is inconsistent with the public interest") ("Foreign Ownership NPRM").

Despite this flexibility, the Commission has thus far not exercised its discretion under Section 310(b)(4) to permit increased foreign investment in the broadcast industry, even though the Commission has frequently exercised its statutory discretion to permit foreign investment above the 25 percent benchmark in the common carrier context.⁶ Regulatory parity alone supports CBI's request.⁷ Particularly in today's competitive multi-platform communications marketplace, the Commission should not continue its disparate treatment of broadcast entities seeking needed investment capital from a variety of sources, including those outside the United States.⁸

Moreover, the Commission has expressly found that "[f]oreign investment" is "an importance source of equity financing for U.S. telecommunications companies, fostering technological innovation, economic growth, and job creation."⁹ There is no reason to believe that foreign investment could not and

⁶ See CBI Letter at 3; Appendix to CBI Letter at 5. See also Foreign Ownership NPRM at ¶ 2 (stating that since 1998, the FCC has "issued approximately 150 section 301(b)(4) rulings authorizing foreign investment in U.S. telecommunications carriers").

⁷ The Commission has stressed the importance of regulatory parity in a variety of contexts. See, e.g., *Promotion of Competitive Networks in Local Telecommunications Markets*, Report and Order in WT Docket No. 99-217, FCC 08-87 (Mar. 21, 2008), at ¶¶ 5, 10; FCC, *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004* (Sept. 8, 2005), at ¶ 32; *Basic Service Tier Encryption*, Report and Order in MB Docket No. 11-169, FCC 12-126 (Oct. 12, 2012), at ¶¶ 8, 23.

⁸ See CBI Letter at 3-4; Appendix to CBI Letter at 1-3.

⁹ Foreign Ownership NPRM at ¶ 2. *Accord Review of Foreign Ownership Policies for Common Carrier and Aeronautical Radio Licensees under Section 301(b)(4) of the Communications Act of 1934, as Amended*, First Report and Order, 27 FCC Rcd 9832, 9833 (2012) ("providing greater flexibility in the structuring of foreign investment in common carrier licensees will enhance opportunities for technological innovation and promote economic growth and potential job creation").

should not become an importance source of equity financing for U.S.

broadcasters as well. As discussed below, the exercise of the FCC's Section

310(b)(4) discretion to permit this increased foreign investment would in all

likelihood produce similar benefits for U.S. broadcasters and their viewers and

listeners.

II. Permitting Increased Foreign Investment under Section 310(b)(4) Would Promote Public Interest Benefits, Including Competition, Diversity and Innovative Services and Programming

“Broadcasters need to access capital in order to grow their business.”¹⁰ More specifically, broadcasters need very substantial investment funds to develop and offer additional services such as new radio and television multicast channels, high definition local television programming including news, digital, high definition radio services, mobile TV and, in the future, 3-D television, ultra-high definition television and other innovative technologies and services not yet envisioned. Broadcasters' expansion of existing services, as well as deployment of new services, via both traditional and new platforms particularly online and mobile, will benefit viewers, listeners and local communities. These expanded services also will require significant capital,¹¹ and the Commission should permit broadcasters to obtain more of the necessary investment from sources outside the United States in appropriate circumstances.

¹⁰ Remarks of Commissioner Ajit Pai, National Association of Broadcasters Radio Show at 5-6 (Sept. 19, 2012), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-316374A1.pdf (also urging FCC to “facilitate more investment in the broadcasting business”).

¹¹ Technological innovations are expensive. To transition from analog to digital, for example, television broadcasters spent billions of dollars in an effort that fundamentally altered every station in the country.

Granting CBI's request will not only benefit broadcasters' audiences but also will enhance competition in the communications and media marketplace. Allowing the broadcast industry an opportunity to access new and additional sources of capital would enable broadcasters to develop and deploy new services more quickly and better keep pace with their cable, satellite and online competitors – all of whom have greater ability to participate in capital markets worldwide.¹² No public purpose is served by preventing broadcasters from obtaining investment capital on a more equitable basis with their direct competitors.

Importantly, CBI's proposal additionally will serve the Commission's long-standing goal of promoting greater diversity, including ownership diversity, in broadcast ownership. As the Commission and Congress have recognized, access to capital is a leading – if not the leading – barrier to increased ownership opportunities in broadcasting and other communications sectors by small businesses generally, and by women and minorities specifically.¹³ Expanding investment opportunities for those with

¹² See CBI Letter at 4; Attachment to CBI Letter at 2.

¹³ See, e.g., *Promoting Diversification of Ownership In the Broadcasting Services*, Report and Order and Third Further Notice of Proposed Rulemaking, 23 FCC Rcd 5922, 5937 (2008) (finding “sufficient evidence in the record to show that difficulty in accessing capital investment currently is inhibiting diversity of ownership of broadcast stations and new entry”); *Section 257 Proceeding to identify and Eliminate Market Entry Barriers for Small Businesses*, Report, 12 FCC Rcd 16802, 16920 (1997) (finding that the “predominant impediment to entry” for small businesses and minority- and women-owned businesses “is access to and cost of capital”); *Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities*, Notice of Proposed Rulemaking, 10 FCC Rcd 2788, 2790-91(1995) (proposing mechanisms to increase minority and female ownership of mass media facilities by “increas[ing] minority and female operators' access to capital, which has consistently been identified as a crucial barrier to entry”); *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Fifth Report and Order, 9 FCC Rcd 5532, 5537 (1994) (concluding that “record clearly demonstrates that the primary impediment to participation” in spectrum-based services by small businesses, minorities and women “is lack of access

limited access to domestic capital markets would be a positive step towards expanding diversity of broadcast ownership. Especially in today's economic climate, even a modest increase in access to investment could be significant. In accord with the minority broadcasters and advocacy groups participating in the CBI, NAB urges the Commission to increase investment opportunities for smaller and more diverse entities by granting CBI's request.

III. There Is No Rational Basis for Declining to Grant CBI's Request

Particularly in light of all the potential benefits from permitting increased investment in broadcasting, the past security-focused rationales for strictly limiting foreign investment in broadcast entities appear outdated and unpersuasive.¹⁴ Indeed, as CBI points out, today's primary security concerns stem not from the possibility of editorial control over broadcast transmissions, but from the possibility that foreign interests will engage in cyber-warfare using our wired and wireless communications networks.¹⁵ The Commission frequently has permitted the companies that own and operate these

to capital," including "higher costs" in "raising capital" and "lending discrimination"). See *also* Small Business Credit and Business Opportunity Enhancement Act of 1992, Pub. L. No. 102-366, 106 Stat. 986 (1992), §§ 112(4), 331(3) & 331(4) (finding that small businesses have "increased difficulties in obtaining credit"; that minority-owned businesses "have found extraordinary difficulties in obtaining credit"; and that women and minorities "have particular difficulty obtaining access to credit or capital"); 47 U.S.C. §§ 309(j)(3)(B); 309(j)(4)(A); 309(j)(4)(D) (recognizing that special measures would be needed to give small and minority/female owned businesses the opportunity to participate in the provision of spectrum-based services).

¹⁴ See CBI Letter at 3-4; Appendix to CBI Letter at 1-3 (discussing how historic concerns underlying a very restrictive approach to foreign ownership in broadcasting have been overtaken by technological and marketplace changes).

¹⁵ See Appendix to CBI Letter at 3 (noting statements of both President Obama and Chairman Genachowski).

networks to exceed foreign investment benchmarks.¹⁶ Moreover, any security-based concerns associated with allowing increased foreign investment must be allayed by the fact that CBI's request addresses only indirect foreign ownership of broadcasters' parent companies under Section 310(b)(4) – not direct foreign ownership interests in licensees under Section 310(b)(3).

NAB additionally observes that CBI's request is quite modest. CBI is not asking the Commission to pre-approve any instances of foreign investment in broadcast licensees' parent companies beyond the 25 percent statutory threshold. Rather, CBI is only requesting that the Commission affirm that it will, going forward, substantively review proposals for foreign indirect investment in excess of 25 percent to determine, in each case, whether that investment serves the public interest. NAB anticipates that the Commission's review would be similar to that done in the common carrier context.¹⁷

The affirmation contemplated by CBI would not restrict the FCC's discretion under Section 310(b)(4) to find that a specific proposal does not serve the public, for security-related or other reasons; it only commits the Commission to conducting a substantive, case-specific review, rather than assuming that any proposal beyond the 25 percent benchmark is *per se* contrary to the public interest. Approving CBI's request will move toward a more rational and even-handed approach to evaluating foreign investment across platforms, and we see no basis to deny it.

¹⁶ *Id.* at 4-5 (discussing foreign investment in Verizon Wireless, T-Mobile USA, Inc., Global Crossing Ltd., Level 3 and Iridium).

¹⁷ For example, the Commission can consider, as one factor, how the foreign investor's country treats U.S. investors and whether there is discriminatory treatment against U.S. investors.

IV. Conclusion

As Commissioner Pai recently stated, “our current policy on foreign investment as applied to the broadcast industry is anachronistic, illogical, and bad for minority ownership.”¹⁸ For these reasons, NAB encourages the Commission to grant CBI’s request as expeditiously as possible.

Respectfully submitted,

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April 15, 2013

¹⁸ Statement of Commissioner Ajit Pai, FCC News Release (Feb. 26, 2013), *available at* <http://www.fcc.gov/document/pai-stmt-modernizing-approach-foreign-investment>.